Sinnathamby a/l Klondakoundan & Ors v Brijkishore a/l Shuparshad

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO T-02-100 OF 1996
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
7 OCTOBER 1997

***Partnership** — Existence of partnership — Intention, conduct and actions of parties — Parties purchased two lots of lands individually and separately — Joint proposal by parties to erect a single building on the two lots — Termination of sale and purchase agreements for the two lots by vendor due to lack of consent from the authority — Subsequent consent obtained by parties — Whether there was element of any joint intention between the parties to purchase the lots together as joint venturers or as partners — Whether subsequent consent binding on vendor and sale and purchase agreements — Whether joint venture was revived thereby — Whether conduct and actions between parties which took place after termination of sale and purchase agreements and joint venture relevant for purposes of determining the existence of joint venture or partnership between them — Partnership Act 1961 ss 4 & 34*

In October 1977, one Lee Chooi Ying ('LCY') — the registered proprietor of Lots 23 and 24 — entered into a sale and purchase agreement ('SPA 1') with the respondent ('BS') and Shriniwas a/l Shuparshad ('SS') for the sale and purchase of Lot 24. On the same date, LCY also entered into another sale and purchase agreement ('SPA 2') with the first appellant ('SK') and Mohan a/l Sinnathamby ('MS'). Under SPA 1 and SPA 2, the purchasers paid the purchase price out of their pockets separately. The terms and conditions of SPA 1 and SPA 2 were exactly the same. Both lots were subject to the same title condition, namely no dealing therewith without first obtaining the written consent of the State Authority. It was provided in both SPA 1 and SPA 2 that the agreements shall be determined upon refusal of such consent and upon refund of the monies paid. A preliminary drawing for a proposed five-storey building on Lots 23 and 24 was prepared on 8 April 1978 for both BS and SK and signed by both of them. On 9 May 1980, LCY was informed that her application for consent to transfer Lots 23 and 24 had been refused. Consequently, LCY terminated both SPA 1 and SPA 2 and refunded to BS and SK the monies they paid. SK and MS then appealed to the State Authority for reconsideration of the application of consent to transfer Lot 23 to them. In January 1985, the consent was given to SK and MS and separately, to BS for the transfer of Lot 24. In August 1988, LCY entered into a sale and purchase agreement with Woo Brothers Develoment ('WBD') for the sale of the same Lot 23 and Lot 24. WBD then entered into a sale and purchase agreement with SK and MS for the purchase of Lots 23 and 24. BS instituted a writ action against SK and MS claiming, inter alia, a declaration that he and SK were partners and that Lot 24 be vested in him. The High Court decided in favour of BS. SK appealed. The primary question before the court was whether the relation between BS and SK constituted a joint venture partnership.

Held, allowing the appeal: A

(1) There is a distinction between a joint venture and a partnership. A joint venture may or may not be a partnership and in deciding whether or not a partnership existed, the court must have regard to the relevant rules in s 4 of the Partnership Act 1961 ('the Act') and the intention of the parties as appearing from the whole facts B of the case and the contract the joint venturers had made. Whether the parties were to be regarded as partners could only be determined if the joint venture between them constituted a partnership 'for a single adventure or undertaking' subsumable under s 34(1)(a) of the Act (see pp 39I and 40A–G). C

(2) In as much as it was represented in the drawing that a five-storey building was proposed to be built on Lot 23 and Lot 24 for BS and SK, the only fair and reasonable inference of fact that could be drawn therefrom was that it was a joint proposal by BS and SK to erect that building on Lot 23 and Lot 24 if the State Authority consented to the transfer of Lot 23 to BS and SS and D Lot 24 to SK and MS in pursuance of SPA 1 and SPA 2. That joint proposal represented a joint venture or undertaking for which agreement was reached on 8 April 1978 between BS and SK (see pp 41H–I and 42A).

(3) There was no documentary evidence to establish the existence of E a joint venture partnership between BS and SK in 1977 or that it was the business of such partnership to acquire Lot 23 and Lot 24 for development. On the contrary, SPA 1 and SPA 2 showed that the sale and purchase transactions for Lot 23 and Lot 24 were separate and did not relate to one another. From the F conduct and actions of BS and SK pertaining to SPA 1 and SPA 2 before and after their termination, it was plain and obvious that BS intended to purchase Lot 24 for himself and SS and likewise in the case of SK and MS in respect of Lot 23. There was no element of any joint intention on the part of BS and SK G to purchase Lot 23 and Lot 24 together as joint venturers or as partners in 1977.

Moreover, the joint venture enterprise to build a five-storey building on Lot 23 and Lot 24 was a transaction not contemporaneous with SPA 1 and SPA 2 but subsequent thereto and such joint venture could only have commenced with effect H from 8 April 1978 and was also subject to the consent of the State Authority to transfer Lot 23 and Lot 24 to them because the sale and purchase transactions and the transfers under SPA 1 and SPA 2 were themselves subject to a condition precedent that the consent of the State Authority be obtained. The termination I of SPA 1 and SPA 2 meant also the termination of the joint venture to build a hotel on Lot 23 and Lot 24 (see pp 42H–I, 43D–E and 44B–E).

(4) When the appeal to the State Authority was made, both BS and SK were already without any beneficial interest in Lot 23 and Lot 24 following the termination of SPA 1 and SPA 2 and the refund in full of the purchase prices to them. Further, such appeal was made without any mandate or authorization from LCY who was the sole legal and equitable owner of those lots. Consequently, when such consent was obtained, it was not binding on LCY and neither SPA 1, SPA 2 nor the joint venture was revived thereby. The conduct and actions between BS and SK which took place in 1988 — some eight years after the termination of SPA 1, SPA 2 and the joint venture — were irrelevant for the purposes of determining the existence of a joint venture or partnership between them. In the premises, the trial court erred in taking them into account (see pp 44F–I and 45A–B).

[Bahasa Malaysia summary

Pada bulan Oktober 1977, seorang bernama Lee Chooi Ying ('LCY') — tuan punya berdaftar Lot 23 dan 24 — telah mengikat suatu perjanjian jual beli ('PJB 1') dengan penentang ('BS') dan Shriniwas a/l Shuparshad ('SS') untuk jual beli Lot 24. Pada tarikh yang sama, LCY juga telah mengikat suatu perjanjian jual beli yang lain ('PJB 2') dengan perayu pertama ('SK') dan Mohan a/l Sinnathamby ('MS'). Di bawah PJB 1 dan PJB 2, pembeli telah membayar harga belian secara berasingan. Terma dan syarat PJB 1 dan PJB 2 adalah sama. Kedua-dua lot adalah tertakluk kepada syarat hakmilik yang sama, iaitu tiada urusan tanpa memperolehi kebenaran bertulis daripada Pihak Berkuasa Negeri. Adalah diperuntukkan dalam kedua-dua PJB 1 dan PJB 2 bahawa perjanjian-perjanjian haruslah ditamatkan sekiranya kebenaran demikian ditolak dan apabila wang dikembalikan. Lukisan permulaan untuk sebuah bangunan lima tingkat yang dicadangkan atas Lot 23 dan 24 telah disediakan pada 8 April 1978 untuk kedua-dua BS dan SK dan ditandatangani oleh mereka berdua. Pada 9 Mei 1980, LCY diberitahu bahawa permohonannya untuk kebenaran memindahmilik Lot 23 dan 24 telah ditolak. Berikutnya, LCY menamatkan kedua-dua PJB 1 dan PJB 2 dan mengembalikan wang yang telah dibayar kepada BS dan SK. SK dan MS kemudiannya merayu kepada Pihak Berkuasa Negeri supaya mempertimbangkan semula permohonan untuk kebenaran memindahmilik Lot 23 kepada mereka. Pada Januari 1985, kebenaran diberikan kepada SK dan MS dan secara berasingan, kepada BS untuk memindahmilik Lot 24. Pada Ogos 1988, LCY telah mengikat suatu perjanjian jual beli dengan Woo Brothers Development ('WBD') untuk jualan Lot 23 dan Lot 24 yang sama. WBD kemudiannya mengikat suatu perjanjian jual beli dengan SK dan MS untuk membeli Lot 23 dan 24. BS memulakan suatu tindakan writ terhadap SK dan MS menuntut, antara lain, suatu perisytiharan bahawa dia dan SK adalah rakan kongsi dan bahawa Lot 24 diletakhak kepadanya. Mahkamah Tinggi membuat keputusan memihak kepada BS. SK merayu. Persoalan

utama di hadapan mahkamah adalah sama ada hubungan di antara BS dan SK membentuk suatu perkongsian bersama. A

Diputuskan, membenarkan rayuan:

(1) Terdapat perbezaan di antara suatu usahasama dan perkongsian. Usahasama boleh merupakan suatu perkongsian atau tidak dan B dalam menentukan sama ada suatu perkongsian wujud atau tidak, mahkamah mestilah mengambil kira kaedah yang relevan dalam s 4 Akta Perkongsian 1961 ('Akta tersebut') dan hasrat pihak-pihak seperti yang menonjol daripada keseluruhan fakta-fakta kes dan kontrak yang telah diikat oleh pengusahasama. Sama ada pihak-pihak harus dianggap sebagai rakan kongsi hanya C boleh ditentukan sekiranya usahasama di antara mereka membentuk suatu perkongsian 'untuk suatu pengalaman atau akujanji tunggal' yang boleh digolongkan di bawah s 34(1)(a) Akta tersebut (lihat ms 39I dan 40A–G).

(2) Sejauh mana ia digambarkan dalam lukisan bahawa sebuah D bangunan lima tingkat dicadangkan dibina atas Lot 23 dan Lot 24 untuk BS dan SK, satu-satunya inferens fakta yang adil dan munasabah yang boleh dibuat daripadanya adalah suatu cadangan bersama oleh BS dan SK untuk mendirikan bangunan atas Lot 23 dan Lot 24 sekiranya Pihak Berkuasa Negeri membenarkan E pindahmilik Lot 23 kepada BS dan SS dan Lot 24 kepada SK dan MS menurut PJB 1 dan PJB 2. Cadangan bersama itu mewakili suatu usahasama atau akujanji yang mana persetujuan telah dicapai untuknya pada 8 April 1978 di antara BS dan SK (lihat ms 41H–I dan 42A).

(3) Tiada keterangan dokumentar bagi membuktikan kewujudan F perkongsian usahasama di antara BS dan SK dalam tahun 1977 atau bahawa ia adalah urusniaga perkongsian demikian untuk memperolehi Lot 23 dan Lot 24 bagi pembangunan. Sebaliknya, PJB 1 dan PJB 2 menunjukkan bahawa transaksi untuk Lot 23 dan Lot 24 adalah berasingan dan tidak berkaitan antara satu G sama lain. Dari kelakuan dan tindak-tanduk BS dan SK mengenai PJB 1 dan PJB 2 sebelum dan selepas penamatan, adalah nyata bahawa BS berhasrat membeli Lot 24 untuk dirinya dan SS dan begitu juga dalam kes SK dan MS berkenaan dengan Lot 23. Tiada elemen tentang sebarang hasrat bersama pada pihak BS dan SK untuk membeli Lot 23 dan Lot 24 bersama sebagai H pengusahasama atau sebagai rakan kongsi dalam tahun 1977.

Tambahan pula, usahasama untuk mendirikan sebuah bangunan lima tingkat atas Lot 23 dan Lot 24 adalah suatu transaksi yang tidak sezaman dengan PJB 1 dan PJB 2 tetapi transaksi terkemudian dan usahasama sedemikian hanya boleh I bermula dari 8 April 1978 dan juga tertakluk kepada kebenaran Pihak Berkuasa Negeri untuk memindahmilik Lot 23 dan Lot 24 kepada mereka kerana transaksi jual beli dan pindahmilik di

bawah PJB 1 dan PJB 2 sendiri tertakluk kepada suatu syarat terdahulu bahawa kebenaran Pihak Berkuasa Negeri diperolehi. Penamatan PJB 1 dan PJB 2 juga bermakna penamatan usahasama untuk mendirikan hotel atas Lot 23 dan Lot 24 (lihat ms 42H–I, 43D–E dan 44B–E).

(4) Apabila rayuan kepada Pihak Berkuasa Negeri dibuat, kedua-dua BS dan SK sudah pun tidak mempunyai apa-apa kepentingan benefisial dalam Lot 23 dan Lot 24 berikutan penamatan PJB 1 dan PJB 2 dan pengembalian wang sepenuhnya atas harga belian kepada mereka. Seterusnya, rayuan begitu dibuat tanpa sebarang mandat atau pemberikuasaan daripada LCY yang merupakan pemilik sah dan ekuiti tunggal lot-lot tersebut. Oleh itu, apabila kebenaran demikian diperolehi, ia tidak mengikat LCY dan baik PJB 1, PJB 2 mahupun usahasama itu tidak dihidupkan semula. Kelakuan dan tindak-tanduk di antara BS dan SK yang berlaku dalam tahun 1988 — kira-kira lapan tahun selepas penamatan PJB 1, PJB 2 dan usahasama itu — adalah tidak relevan bagi tujuan menentukan kewujudan usahasama atau perkongsian di antara mereka. Berdasarkan keadaan demikian, mahkamah perbicaraan terkhilaf dalam mengambil kira perkara ini (lihat ms 44F–I dan 45A–B).]

Notes

For a case on the existence of a partnership, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 846.

Cases referred to

Chooi Siew Cheong & Anor v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513 (refd)

Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors [1982] 2 MLJ 181 (refd)

Legislation referred to

Partnership Act 1961 ss 4, 34(1)(a)

Appeal from: Civil Suit No 22–88 of 1989 (High Court, Kuala Terengganu)

Raja Aziz Addruse (*Liza Chan & Co*) for the appellants.
SM Appadurai and *Vendargon* (*Vendargon & Partners*) for the respondent.

Cur Adv Vult

Denis Ong JCA (delivering the judgment of the court): This is an appeal by the defendants (the appellants) in the action against the whole decision of the High Court given on 4 February 1996 in favour of the plaintiff (the respondent).

The facts and circumstances giving rise to this action are as follows. The registered proprietor of Lots 23 and 24, Section 3, Village of Brinchang, District of Cameron Highlands ('Lot 23' and 'Lot 24' respectively) was one Lee Chooi Ying ('LCY'). Both lots were subject to the same title condition namely, no dealing therewith without first obtaining the written consent of the Ruler-in-Council. On 7 October 1977, LCY entered into a sale and purchase agreement ('SPA(1)') with Brijkishore a/l Shuparshad, the respondent ('BS',) and another named Shriniwas a/l Shuparshad ('SS') for the sale and purchase of Lot 24 for a consideration of RM45,500; RM5,000 to be deposited forthwith and the balance of RM40,500 to be paid to M/s Yeap & Yeap (Advocates & Solicitors) as stakeholders not later than 2 April 1978. The date of completion of the sale was of the essence of the contract as stipulated by cl 10 or sooner if the consent in writing of the Ruler-in-Council to the transfer was obtained earlier. It was expressly stipulated as a condition in SPA(1) that the agreement therein was subject to the written consent of the Ruler-in-Council for the transfer of Lot 24 to BS and SS and by cl 3 of SPA(1), it was the responsibility of LCY to apply for such consent promptly. Under cl 9, it was provided that SPA(1) shall be determined upon receipt by LCY of the notification of refusal of such consent by the Ruler-in-Council and upon refund by LCY of the RM5,000 deposit to BS and SS. On the same date, ie 7 October 1977, and separately, LCY also entered into another sale and purchase agreement ('SPA(2)'), this time with Sinnathamby a/l Klondakoundan ('SK'), the first appellant and Mohan a/l Sinnathamby ('MS') the fourth appellant for the sale and purchase of Lot 23 for the same amount of consideration, ie RM45,500 and on exactly the same terms and conditions as in SPA(1) including the consent of the Ruler-in-Council to the transfer of Lot 23 to SK and MS. The same firm of advocates and solicitors namely, M/s Yeap & Yeap acted for both vendor and purchasers in SPA(1) and SPA(2) and also as stakeholders.

In accordance with the terms of SPA(2), SK and MS on their own paid to M/s Yeap & Yeap as stakeholders the full sum of the consideration, initially on 30 September 1977 by way of deposit and subsequently on 18 April 1978 the balance of the purchase price and these payments were received into the client account of M/s Yeap & Yeap. The professional charges totalling RM139.50 pertaining to SPA(2) were also settled by SK and MS. These payments were documented at pp 366 to 369 of the appeal record. In the case of SPA(1), there was no documentary evidence of such like payments in the appeal record although it was not disputed that BS and SS made exactly the same payments to M/s Yeap & Yeap.

On 4 October 1977, M/s Yeap & Yeap wrote to SK requesting the latter to fill in the particulars of himself and MS required by the application forms for the consent of the Ruler-in-Council. A preliminary drawing for a proposed five-storey shopping cum hotel building on Lots 23 and 24 was sent under cover of a letter dated 8 April 1978 from M/s Foo & Yee Jurutera Perunding addressed to the names of both BS and SK for their perusal, comment and early instruction. At the foot of the preliminary drawing was a caption which read thus: 'Proposed Five-Storeyed Shopping

A and Hotel Building on Lots No 23 and 24 Township of Tanah Rata Cameron Highlands For M/S Brijkishore and K Sinnathamby' and next to it were the signatures of both BS and SK. Although SK disputed the date of the preliminary drawing which BS asserted was 8 April 1978, it was common ground between them that such drawing was never submitted to the Majlis Daerah before 9 May 1980. On 9 May 1980, the Pengarah B Tanah dan Galian wrote to LCY to inform that her application for consent to transfer Lot 23 and Lot 24 had been refused by the State Authority. That letter was copied to BS and SK and addressed to No 18, Brinchang, Cameron Highlands, the address of BS. Consequent upon the refusal of the State Authority, LCY terminated both SPA(1) and SPA(2); C and M/s Yeap & Yeap as stakeholders refunded to BS and SK in full the monies they paid plus interest earned. The refund was by way of two separate cheques, one to BS and another to SK each of which was to the value of RM50,631.23. Individually, each of them in their own name deposited a sum of RM45,500 in time deposit account from 6 October 1980 to 6 March 1984 with the Hongkong and Shanghai Banking D Corporation ('HSBC') and such deposit was expressed to be for the purchase of Lot 23 and Lot 24. On 6 March 1984, they withdrew from HSBC and placed their individual deposits of RM45,500 each in fixed deposit placement accounts with Arab Malaysian Finance Bhd ('AMFB') again in their own individual names and for the same purpose as before, E having previously arranged by letter dated 29 March 1983 (appeal record p 311) with AMFB. The figure of RM50,631.28 in p 311 was derived from M/s Yeap & Yeap's letter dated 17 September 1980 at appeal record p 502 which figure included interest earned.

On their own behalves, in their joint names and acting through their F solicitors M/s HL Sharma, SK and MS wrote on 18 June 1980 to the Pengarah Tanah dan Galian to enquire if the latter was prepared to reconsider LCY's application for the consent of the Ruler-in-Council to transfer Lot 23 to them. The reply of the Pejabat Tanah dan Galian dated 23 July 1980 was in the affirmative and on the same day, M/s HL Sharma appealed in writing to the Pengarah on behalf of their clients and in respect G of Lot 23 only. The same solicitors also wrote to LCY informing her of the positive disposition of the Menteri Besar if she put up an appeal. As there was no response from LCY, M/s HL Sharma appealed again on behalf of their said clients to the Pengarah Tanah dan Galian by letter dated 15 November 1984 (appeal record p 370) enclosing a proposed building H plan marked 'S' which SK and MS intended to build on Lot 23. The outcome was that consent of the Ruler-in-Council to the transfer of Lot 23 to SK and MS was given by the Menteri Besar Pahang on 26 January 1985 (appeal record p 303). Separately, on the same date, BS was also notified in writing (appeal record p 302) that consent of the Ruler-in-Council was given by the Menteri Besar Pahang for the transfer of Lot 24 to him.

I As there was no response from LCY regarding the appeal to the Ruler-in-Council, SK and MS filed S/798/82 in the Ipoh High Court against LCY for specific performance of the contract in SPA(2). On the same date, BS also filed a separate action S/799/82 in the Ipoh High Court

for specific performance of the contract in SPA(1). LCY defended, counter claimed for damages and applied to the court to strike out both actions and also for judgment in respect of damages to be assessed against SK and MS and also against BS. The interlocutory application in S/798/82 was heard and on 23 September 1985, the court ordered the writ of summons and statement of claim to be struck out and judgment be entered for LCY in respect of her counterclaim and for damages to be assessed and for costs of the action. SK appealed to the Supreme Court in Supreme Court Appeal No 31/86 against the order of the High Court and on 8 July 1986, the Supreme Court dismissed the appeal with costs.

On 10 December 1986, LCY entered into another sale and purchase agreement ('SPA(3)') this time with Woo Brothers Development Sdn Bhd ('Woo Brothers') for the sale of both Lot 23 and Lot 24 for a total consideration of RM350,000 and the date of completion of sale stipulated to be of the essence of the contract was 10 December 1987. The contract in SPA(3) was terminated by LCY because Woo Brothers did not pay in time.

On 12 May 1988, by consent of the parties in S/798/82, the court ordered SK and MS to pay to LCY RM20,000 in full satisfaction of costs and damages in the suit and counterclaim and in Supreme Court Appeal No 31/86. BS accepted liability for the figure of RM20,000 in full settlement and a like order was made in S/799/82. Both SK and BS settled with LCY their respective amounts out of their own pockets individually. N Selvarajah acted as counsel for both SK and BS at the hearing on 12 May 1988 before the senior assistant registrar, on the authority of M/s HL Sharma (appeal record p 408) and counsel's fees were settled by each of them individually. SM Ching appeared as counsel mentioning on behalf of LCY's solicitors. SM Ching was also the daughter-in-law of LCY. On the same day at the courthouse in Ipoh, the topic of sale and purchase of Lot 23 and Lot 24 was brought up afresh in the presence of both counsel and also in the presence of SK and BS. It was common ground that if SK and BS wanted to purchase Lot 23 and Lot 24 as vacant lots again, LCY was not minded to sell to them; as a result, nothing fruitful came out of that meeting.

On 23 August 1988, LCY entered into yet another sale and purchase agreement ('SPA(4)') with Woo Brothers for the sale of the same Lot 23 and Lot 24 for a total consideration of RM300,000. The date of completion of the sale was 23 May 1989 which was stipulated to be of the essence of the contract.

On 24 November 1988, by appointment with N Selvarajah, SK, BS and Woo Kai Hong of Woo Brothers met N Selvarajah at his office for negotiation about the purchase of Lot 23 and Lot 24 together with two units of shophouses about to be constructed. In that meeting, Woo Kai Hong made an offer to sell each unit at RM400,000. None of them agreed to buy at that price. SK made known to Woo Kai Hong that he was interested to purchase both units but BS never said to Woo Kai Hong that he wanted to buy any unit.

A On 8 December 1988, BS left for India; on 8 February 1989, Woo Brothers entered into a sale and purchase agreement ('SPA(5)') with MS and the second, third, fifth and sixth appellants for the sale and purchase of Lot 23 and Lot 24 complete with the two units of four storey shophouses to be constructed thereon for a total purchase price of RM800,000. SK B signed SPA(5) as attorney for second to sixth appellants, the purchasers who were his family members. BS returned from India on 10 February 1989.

On 1 August 1989, BS instituted a writ action against SK and the second to sixth appellants claiming firstly, a declaration that he and SK were partners, an order for dissolution of the partnership, winding up of the partnership affairs, accounts and enquiries, that Lot 24 be vested in C him and that the appellants or such of them do execute all acts and assurances to give effect to his rights so declared; and secondly, a declaration that the appellants or such of them were trustees for him in respect of Lot 24 subject to payment by him of all costs, charges and expenses incurred; thirdly, damages for breach of trust alternatively, damages for D breach of duty as agent/agents of BS, interest and costs.

The action came on for trial proper on 30 November 1991 where oral evidence was heard from both sides in addition to affidavit evidence filed and on 4 February 1996 the High Court gave an oral decision in favour of BS in terms prayed for in the statement of claim. A copy of the judgment was to be found at rekod rayuan tambahan (kedua) p 1 and the E grounds of judgment dated 29 March 1996 was filed separately in rekod rayuan tambahan bahagian 'A'.

At the hearing of this appeal, arguments from both sides centred on the primary question of whether the relation between BS and SK constituted a joint venture partnership. Learned counsel for the appellants who included F SK submitted firstly, that there was no joint venture agreement or partnership; at best there was only an agreement to build an hotel on Lot 23 and Lot 24; and secondly, even if there was agreement to build a hotel, such an agreement was frustrated and terminated because the consent of the Ruler-in-Council was refused; Woo Brothers had bought G over Lot 23 and Lot 24, and that Woo Brothers had subsequently offered both lots for sale to the public. Learned counsel for BS submitted that in law and in equity, SK and BS were partners for a single adventure and for profit, and that Lot 23 and Lot 24 purchased in the names of the second to sixth appellants (who were the immediate family members of the first appellant) were a joint venture partnership asset.

H It is a fact that there was no joint venture agreement or a partnership agreement in writing between BS and SK. The issues raised by the first submission of learned counsel for the appellants are: (a) whether the understanding and arrangements between BS and SK constituted a joint venture; and (b) whether such joint venture was a partnership under the I provisions of the Partnership Act 1961 ('Act 135'). It is more or less accepted that there is a distinction between a joint venture and a partnership; that a joint venture may or may not be a partnership and that in deciding whether or not a partnership existed, the court must have regard to the

relevant rules in s 4 of Act 135 and the intention of the parties as appearing from the whole facts of the case and the contract the joint venturers had made: *Chooi Siew Cheong & Anor v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513 (FC) at pp 521 D–F, 522 A–D. That was a case where there was a joint venture agreement in writing and one of the questions for the court's decision was whether the joint venture project was a partnership under Act 135. Higgins and Fletcher — *The Law of Partnership in Australia and New Zealand* — (1996, 7th Ed) at p 90 stated the law thus:

> Whether, in the absence of an express agreement, a partnership contract can be inferred from the conduct of the parties is purely a question of fact depending upon the joint and not the individual intention of the parties. The intention is not to be determined by an examination of the private intention of each party but is to be ascertained by inference from their conduct and actions, throughout the whole course of their dealings with each other. As the ascertainment of a joint intention is a questions of fact, a determination by a trial judge or jury will not normally be subject to review by an appellate court.

Of the two issues raised by the first submission of learned counsel for the appellants, little (if at all) was canvassed by learned counsel on both sides on the first issue in their submissions before the trial court although joint venture partnership was specifically averred in paras 4 and 9 of the statement of claim as the basis by which BS and SK became partners which averments were specifically denied in para 5 of the defence. It would appear from the submissions of both learned counsel that both sides accepted without argument that the arrangement and the understanding between BS and SK constituted a joint venture agreement between them notwithstanding that there was no such agreement in writing. In the result, both sides concentrated their arguments on the second issue which the trial court dealt with.

In the premises, we approached this appeal on the footing that in the state of affairs which existed between BS and SK, the association between them was one of joint venturers. Indeed, that seemed to be the approach of the trial court from its grounds of judgment. The next issue was whether they were to be regarded as partners. That status could only be determined if the joint venture between them constituted a partnership 'for a single adventure or undertaking' subsumable under s 34(1)(a) of Act 135.

As we understood it, the mainstay of BS's argument both here and in the trial court for the existence of a partnership between him and SK were:

(i) the preliminary drawing of a proposed five-storey shopping cum hotel building on Lot 23 and Lot 24 and M/s Foo & Yee's letter dated 8 April 1978;

(ii) the plan of shophouses which Woo Brothers proposed to construct on Lot 23 and Lot 24; and

(iii) the meeting on 24 November 1988 at the law office of N Selvarajah between Woo Kai Hong, SK, BS and N Selvarajah.

A It was a fact that the preliminary drawing in (i) was signed by both BS and SK. What SK disputed was the purpose for which it was intended to be used and the date it was prepared. According to his evidence, the drawing was intended to be used to bolster their individual appeals dated 15 November 1984 to the Pengarah Tanah dan Galian Pahang against the B State Authority's refusal of consent to transfer Lot 23 and Lot 24 from LCY to SK and MS and also to BS and SS in pursuance of SPA(2) and SPA(1) respectively which refusal was conveyed to them by a copy letter dated 9 May 1980 from the Pengarah Tanah dan Galian Pahang to LCY. BS on the other hand, asserted in evidence that the drawing was prepared on 8 April 1978 for submission to the District Council although not C submitted to the Council in 1978 because at that time Lot 23 and Lot 24 had as yet to be transferred to them. The trial court preferred the oral evidence of BS to that of SK and implicitly accepted for a fact that it was more probable and reasonable that the drawing was prepared on 8 April 1978 and was intended for submission to the District Council after the transfer of Lot 23 and Lot 24 although never so submitted.

D As at 8 April 1978, the proposed transfer of Lot 23 to BS and SS and Lot 24 to SK and MS under SPA(1) and SPA(2) depended on the fulfilment of two conditions:

(a) Settlement by them of the balance of the purchase price for Lot 23 E and Lot 24 in the sum of RM40,500 each. Under SPA(1) and SPA(2), such balances were due on 2 April 1978. They were paid to M/s Yeap & Yeap in the case of SK on 18 April 1978, ten days after the preliminary drawing was prepared and in the case of BS, no date of payment was known.

F (b) The consent of the State Authority of Pahang. From M/s Yeap & Yeap's letter at p 365 of the rekod rayuan (bahagian C), it was evident that as early as 4 October 1977 even before SPA(1) and SPA(2) were executed, they made prompt preparations for LCY's application for such consent. There was no dispute that on her part LCY submitted the application for consent; however, as at 8 April G 1978, LCY, BS and SK had yet to be informed by the State Authority of the outcome of that application.

Thus, although condition (a) was not fulfilled on 8 April 1978, it was fulfilled belatedly. But condition (b) was not fulfilled as at 8 April 1978.

In as much as it was represented in the drawing that the five-storey H building proposed to be built on Lot 23 and Lot 24 as one building with a common main entrance as Mr Appaduray rightly pointed out and that such building was expressly for M/s Dato Brijkishore (BS) and K Sinnathamby (SK) both of whom signed on such drawing, in our opinion the only fair and reasonable inference of fact that could be drawn I therefrom was that it was a joint proposal by BS and SK to erect that building on Lot 23 and Lot 24 if the State Authority consented to the transfer of Lot 23 to BS and SS and Lot 24 to SK and MS in pursuance of SPA(1) and SPA(2). That joint proposal represented a joint venture or

undertaking for which agreement was reached on 8 April 1978 between BS and SK. A

BS however, claimed that he and SK became partners in a joint venture partnership in 1977 and that such partnership related to the purchase of Lot 23 and Lot 24 with a view to their development. He alleged that the terms of such partnership orally agreed between them were: B

(a) that Lot 23 to be registered in the joint names of SK and his nominee and Lot 24 to be registered in the name of BS; and

(b) that the costs, charges and expenses incurred and the profits from the joint venture partnership were to be shared and apportioned between them. C

BS stated in evidence that the transactions in SPA(1) and SPA(2), the payments made thereunder including legal fees and expenses were what they orally agreed in (a) and (b) above. He reasoned firstly, that Lot 23 and Lot 24 were two separate lots and in the event that anything should happen to them, each one would know which lot belonged to him which D partly accounted for bringing in SS and MS into SPA(1) and SPA(2). Secondly, he said that the payments were to be regarded as the half share each contributed. Lastly, he said that from the standpoint of finance, they would be able to secure more finance for the shopping cum-hotel project. SK on the other hand, denied that there was at any time any agreement E oral or otherwise between him and BS to entering to a joint venture partnership for the acquisition and development of Lot 23 and Lot 24. He maintained that the transactions in SPA(1) and SPA(2) were separate and distinct and that each one paid for his own lot.

It did not appear from the grounds of judgment of the trial court that F it had canvassed the dispute as to the existence or otherwise of a joint venture partnership between BS and SK in 1977, whether it was the business of such partnership to acquire Lot 23 and Lot 24 for development and the significance of the requisite consent to the transfer of the State Authority to the validity of SPA(1) and SPA(2). The starting point of its discussion of the evidence was the preliminary drawing which it accepted G was prepared on 8 April 1978. Consequently, in para 7(d) of the grounds of judgment, when it drew an inference of fact from the actions of BS and SK that there was a joint venture partnership between them from the beginning, it could only have meant from 8 April 1978.

There was no documentary evidence to establish the existence of a H joint venture partnership between BS and SK in 1977 or that it was the business of such partnership to acquire Lot 23 and Lot 24 for development. On the contrary, SPA(1) and SPA(2) showed that the sale and purchase transactions for Lot 23 and Lot 24 were separate and did not relate to one another. Under SPA(2), the purchasers were SK and MS and the land the subject matter of the purchase was Lot 23. Under SPA(1), the purchasers I were BS and SS and the land the subject matter of the purchase was Lot 24. Under SPA(1) and SPA(2), the purchasers had to pay a deposit of RM5,000 in 1977 which they did and out of their pockets separately. On

A 18 April 1978, which was ten days after they both signed the preliminary drawing signifying their agreement to the joint venture to build a five-storey hotel cum shophouses, SK and BS continued to pay the balance of RM40,500 out of their pockets separately. Until the transfer, the only persons who had a beneficial interest in Lot 23 were SK and MS in equal shares. Likewise, the only persons who had a beneficial interest in Lot 24 B were BS and SS also in equal shares. In both instances, LCY the vendor was the trustee. BS and SS had no interest in Lot 23; and SK and MS had no interest whatever in Lot 24. When LCY terminated SPA(1) and SPA(2) following refusal of the State Authority by letter dated 9 May 1980, the purchase prices were refunded in full by M/s Yeap and Yeap plus interest C earned to BS and SK individually on 17 September 1980. With the refund, SK, MS, and BS ceased to have any beneficial interest in Lot 23 and Lot 24 and LCY ceased to be a trustee so that on 17 September 1980, LCY was once again the sole legal and beneficial owner of both lots. Each of them separately and individually invested the monies in fixed deposits initially with HSBC and subsequently with AMFB. From the conduct and D actions of BS and SK pertaining to SPA(1) and SPA(2) before and after their termination, it was plain and obvious to us that BS intended to purchase Lot 24 for himself and SS and likewise in the case of SK and MS in respect of Lot 23. There was no element of any joint intention on the part of BS and SK to purchase Lot 23 and Lot 24 together as joint E venturers or as partners in 1977.

BS gave three reasons to justify their conduct and actions which reasons we had mentioned earlier. If the partnership was already in existence in 1977 and the first reason was genuine, it would clearly be a departure from regarding Lot 23 and Lot 24 as partnership property common to F both. If the second reason was genuine, then Lot 23 and Lot 24 were intended as partnership property with each partner holding equal shares in Lot 23 and Lot 24. Only one sale and purchase agreement would have been necessary between LCY (as vendor) and BS and SK (jointly as purchasers) and there would have been no reason whatever to bring in SS and MS as purchasers. They did not contribute towards the payment and G were never intended to be partners or joint venturers. Further, if the monies for purchasing Lot 23 and Lot 24 were share contributions on BS and SK as partners, they should have been paid out of a partnership account and not from their individual pockets. And when they were refunded by M/s Yeap & Yeap, such monies should have been paid into the partnership account. The second reason seemed to be inconsistent in H itself and with the first reason. The third reason of BS was not a consideration relevant to the existence of a partnership between him and SK. The matter of finance must relate to some sort of a development plan in existence in 1977; there was no such plan at that time. If there was a plan in 1977, it would have been a plan contemporaneous with SPA(1) I and SPA(2) and would have been submitted together with the application form to the State Authority for its consent to transfer. In point of time, the preliminary drawing referred to earlier was prepared on 8 April 1978, six months after SPA(1) and SPA(2) were entered into and six days after

2 April 1978, the date of completion of the sale stipulated in cl 4 of SPA(1) and SPA(2). Hence, the third reason appeared to be irrelevant, speculative and unrealistic. In the premises, it was neither reasonable nor probable to infer a joint venture or a partnership between BS and SK in 1977 for the purchase of Lot 23 and Lot 24 with a view to their development. Based on SPA(1) and SPA(2) respectively, the sole intention of BS was to purchase Lot 24 for himself and SS and the sole intention of SK was to purchase Lot 23 for himself and MS. The joint venture enterprise for the building of a five-storey hotel cum shophouses on Lot 23 and Lot 24 was a transaction not contemporaneous with SPA(1) and SPA(2) but subsequent thereto and such joint venture could only have commenced with effect from 8 April 1978 and was also subject to the consent of the State Authority to transfer Lot 23 and Lot 24 to them because the sale and purchase transactions and the transfers under SPA(1) and SPA(2) were themselves subject to a condition precedent that the consent of the State Authority be obtained. Since such consent was refused and by the decision conveyed to LCY, BS and SK, the condition precedent was unfulfilled; LCY was entitled to treat SPA(1) and SPA(2) as having come to an end: see *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181 (FC). LCY formally terminated them and refunded the purchase price in full to BS and SK through M/s Yeap & Yeap. The termination of SPA(1) and SPA(2) meant also the termination of the joint venture to build a five-storey hotel cum shophouses on Lot 23 and Lot 24.

Between 18 June 1980 and 8 July 1986, various attempts were made by BS and SK to revive SPA(1) and SPA(2). These included resurrecting with the Pengarah Tanah dan Galian Pahang and LCY the issue of consent of the State Authority to transfer Lot 23 and Lot 24 to BS and SK and actions for specific performance of SPA(1) and SPA(2). When the appeal to the State Authority was made on 15 November 1984, it must be observed that both BS and SK were already without any beneficial interest in Lot 23 and Lot 24 following the termination of SPA(1) and SPA(2) and the refund in full of the purchase prices to them. Further, such appeal was made without any mandate or authorization from LCY who was the sole legal and equitable owner of those lots. Consequently, when such consent was obtained on 26 January 1985, it was not binding on LCY and neither SPA(1), SPA(2) nor the joint venture was revived thereby. As regards the actions for specific performance, they were struck out by the High Court and appeals therefrom were dismissed by the Supreme Court on 8 July 1986. Four months afterwards, LCY entered into a sale and purchase agreement (SPA(3)) with Woo Brothers by which Woo Brothers became purchasers of Lot 23 and Lot 24 for a total price of RM300,000. The second and third arguments of BS mentioned earlier were conduct and actions between BS and SK which took place in June, July or August and November 1988 some eight years after the termination of SPA(1), SPA(2) and the joint venture. Consequently, they were irrelevant for the purposes of determining the existence of a joint venture or partnership between them. These arguments were advanced in the trial court on the basis that the joint venture partnership was never terminated and continue to exist.

As I said earlier, the joint venture agreed to orally, came to an end with the termination of SPA(1) and SPA(2) and the refund of the purchase price in full to BS and SK. The acts and conduct referred to arose from a fresh attempt to purchase Lot 23 and Lot 24 not from LCY but from Woo Brothers. In the premises, the trial court erred in taking them into account.

For the reasons stated, this appeal is allowed with costs here and below. Deposit to be refunded to the appellants. Order accordingly. Although both sides submitted in this appeal on the question of whether the relationship between BS and SK created an agency in the events that followed from 12 May 1988, the trial court made no decision on that question expressly or by implication. If it did, the sealed order of court at pp 1, 2 and 3 of the rekod rayuan tambahan (kedua) would have expressly incorporated prayer (h) of the statement of claim which it did not. Insofar as ground 3 of the memorandum of appeal purported to represent that the trial court held/found that the first appellant owed a duty to the respondent as an agent/fiduciary arising from the joint venture partnership and in relation to Lot 24, that was in excess of the grounds of judgment. The sole question considered and decided by the trial court was whether or not the relationship between BS and SK constituted a joint venture partnership which it decided in the affirmative. In the premises, ground 3 of the memorandum of appeal was unfounded and we decline to decide on it.

Appeal allowed.

Reported by Jafisah Jaafar